IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5313

DONALD L. BROOKS,
Petitioner,

v.

TENNESSEE,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

BRIEF FOR PETITIONER

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OPINION BELOW

A copy of the opinion of the Court of Criminal Appeals of Tennessee is appended (Appendix p. 6a).

JURISDICTION

The judgment of the Supreme Court of Tennessee was entered on August 16, 1971. The petition for a writ of certiorari was filed on August 25, 1971 and granted on November 16, 1971. The jurisdiction of this Court rests upon 28 U.S.C.A. 1257 to review the final decision of the highest court of the State of Tennessee.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States:

AMENDMENT 5

Criminal actions—Provisions concerning—Due Process of law and just compensation clauses.—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6

Rights of the accused.—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT 14

Citizenship—Due process of law—Equal protection.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves Article I, Section 9 of the Tennessee Constitution.

Right of the accused in criminal prosecutions.—That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or presentment, a speedy public trial, by an impartial jury of the County in which the crime shall have been committed, and shall not be compelled to give evidence against himself.

QUESTIONS PRESENTED

I. The trial court was in error in refusing to allow defendant to be placed on the witness stand after other witnesses had testified in his behalf as said Tennessee Statute requiring defendant to be first witness is unconstitutional in violation of the Fifth Amendment, Sixth Amendment and Fourteenth Amendments of the Federal Constitution and Article I, Section 9 of the Tennessee Constitution.

II. Code section 40-2403 deprives a defendant of due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE FACTS

The petitioner, Donald L. Brooks, was convicted of Armed Robbery in case number 118061 and the jury fixed petitioner's punishment at ten (10) years in the State Penitentiary on April 1, 1970. The petitioner was also found guilty by the jury of Unlawfully Carrying a Pistol in case number 118079 and the trial court fixed defendant's punishment at eleven months and twenty-nine days in the workhouse and a fine of Fifty Dollars ($50.00) and costs and ordered this sentence to be consecutive to the sentence in case number 118061. A motion for new trial was filed and overruled. The petitioner prayed an appeal and was allowed ninety (90) days within which to prepare his bill of exceptions. The petitioner was charged with the offenses of Armed Robbery and Unlawfully Carrying a Pistol on the date of October 30, 1969.

Petitioner subsequently filed appeals to the Court of Criminal Appeals of Tennessee and Supreme Court of Tennessee which were overruled and he filed a Writ of Certiorari to the United States Supreme Court which was granted on November 16, 1971. Petitioner raised several questions on which the Court has not granted certiorari.

The petitioner in the trial court attempted to question the Constitutionality of Tennessee Code Annotated 40-2403 (R. 89-92) (Appendix p. 1a).

ARGUMENT AND AUTHORITIES

I. THE TRIAL COURT WAS IN ERROR IN REFUSING TO ALLOW DEFENDANT TO BE PLACED ON THE WITNESS STAND AFTER OTHER WITNESSES HAD TESTIFIED IN HIS BEHALF AS SAID TENNESSEE STATUTE REQUIRING DEFENDANT TO BE FIRST WITNESS IS UNCONSTITUTIONAL IN VIOLATION OF THE FIFTH AMENDMENT, SIXTH AMENDMENT AND FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION AND ARTICLE I, SECTION 9 OF THE TENNESSEE CONSTITUTION.

In 1887, the Tennessee General Assembly enacted a statute entitled "An act to permit parties defendant in criminal causes to testify in their own behalf. This statute now appears in *Tennessee Code Annotated*, as follows:

> *§ 40-2402.* Competency of defendant.—In the trial of all indictments, presentments, and other criminal proceedings, the party defendant thereto may, at his own request but not otherwise, be a competent witness to testify therein.
>
> *§ 40-2403.* Failure of defendant to testify Order of testimony. The failure of the party to testify in his own behalf shall not create any presumption against him. But the defendant desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case.

Peck v. State, 86 Tenn. 259, 6 S.W. 389 (1888) was the first case which considered the above quoted enactment. In speaking in terms of the Act's effect on a defendant, the Supreme Court stated:

> The Act undertakes to distinguish him from other witnesses in only three particulars: (1) He is not to be called except upon his own request; (2) His failure to take the stand is not to create any presumption against him; (3) He must be the first to testify for the defense when he proposes to become a witness. The first two are privileges not enjoyed by other parties; the last is a burden.

In the instant case, it is the latter portion of § 40-2403 which states that a defendant who chooses to testify in his own behalf must be the first defense witness presented, that creates the problem under consideration. It is contended on the behalf of the present petitioner that this portion of § 40-2403 creates such a serious restriction on a defendant's presentation of his defense that it is violative of the Due Process Clause of the Fourteenth Amendment of the United States Constitution, the Fifth Amendment, Sixth Amendment and Tennessee Constitution, Art. 1, Section 9.

An examination of the cases which have construed § 40-2403 is proper at this point. Although there is some question as to the certainty of the points, it appears that the requirement that the defendant be the first defense witness is mandatory. *Rayland v. State,* 86 Tenn. 472, 7 S.W. 456 (1888), by dicta, stated:

> The provision that the defendant shall offer himself before any of his proof is taken is mandatory, and, unless pursued, the defendant will not be permitted to testify . . .

Clemons v. State, 92 Tenn. 282, 21 S.W. 525 (1893) held squarely that it is mandatory that the defendant be the first defense witness, if he is to testify at all. In *Clemons,* at the close of the State's evidence, the defendant's counsel placed two witnesses on the witness stand, and then offered the defendant. Counsel asserted that it was "oversight" that the defendant did not testify first, and that the defendant would not testify as to matters upon which the first two defense witnesses were examined. In holding that the defendant could not testify, the Court stated:

> The provision is that the defendant may be the first witness in his own behalf, but not the second, third, or fourth. He may testify at one particular stage of the case, but at none other, under any circumstances.

Martin v. State, 157 Tenn. 383, 8 S.W.2d 479 (1928) held that under some circumstances the requirement that the defendant testify prior to other defense witnesses could be

waived. Although on its face contrary to Rayland and Clemons, the holding is a sound one. In Martin, after the defense had placed several witnesses on the stand, the defendant was called to testify. The State did not object, but for some undisclosed reason the defendant did not actually become a witness. After the State had rebuttal, the defendant was then placed upon the witness stand and was subjected to cross-examination. The defendant was convicted of the offense of driving an automobile while under the influence of alcohol. Defendant appealed, assigning as error the fact that he was allowed to take the stand as a witness other than the first defense witness. The Supreme Court held that the error was invited by the defendant's own conduct, and that the requirements of the statute could be waived.

It is clear that under §40-2403 the defendant will be entitled to testify on rebuttal. *Arnold v. State,* 139 Tenn. 674 202 S.W. 935 (1918), the Court stated:

> We think it was not intended by the Legislature that a defendant in a criminal case should be permitted to testify in his own behalf and not be permitted to rebut testimony against him which was offered by the State after he had taken and left the witness stand.

It has not been decided whether a defendant may testify in rebuttal if he did not testify on direct. In Arnold, this problem was not presented. The inference from *Martin v. State,* supra, however, is that unless the defendant testified on direct he would not be allowed to testify on rebuttal.

The reason for requiring the defendant to testify before defense witnesses is stated in 6 Wigmore, Evidence, 3rd Ed. §1869 (194__):

> The reason for this rule is the occasional readiness of the interested person to adapt his testimony when offered later to victory rather than veracity, as to meet the necessities as laid open by prior witnesses . . . .

Seemingly, this is the only rational basis for such a requirement. Admittedly, the requirement places a "burden" upon the defendant, *Peck v. State*, supra.

In Tennessee, it is a rule of law that witnesses may be placed in care of the sheriff or some other officer so that they cannot hear what is said by the witness being examined. As stated in *Nelson v. State*, 32 Tenn. 237, 257 (1852):

> This practice of examining the witnesses separate and apart from each other, at the request of either party, is invaluable in many cases for the ascertainment of truth and the detection of falsehood. Such has been the experience of wise men in all ages from the days of Daniel, that divinely-inspired Judge, down to the present time.

Indeed, the doctrine of sequestration is so ingrained in Tennessee Law that it is often referred to merely as "the rule". See *Nelson v. State*, supra and *Ezell v. State*, 413 S.W. 2d 678 (Tenn. 1967).

Of course, "the rule" of sequestration does not apply to parties to a suit whether civil or criminal. Tennessee Code Annotated, Section 24-106 (1871) provided:

> Nothing in any section of this chapter shall be construed to require the parties or either of them to be put under the rule, when witnesses in any cause in which the rule has been applied for and granted.

Also, the Tennessee Supreme Court stated in *Ezell v. State* that:

> The right of a criminal defendant to present witnesses in his own behalf, is a basic constitutional safeguard; consequently, any rule which abridges this right must be examined with scrutiny. By virtue of their constitutional rights persons accused of crimes are entitled to be present at every stage of the trial and are therefore exempt from the rule of exclusion of witnesses. (Emphasis supplied.) 413 S.W.2d at 680-681.

Thus, the Supreme Court expressed the view that there are constitutional reasons why a party could not be sequestered as an ordinary witness.

The fact that a party may not be placed under "the rule" was probably one of the chief reasons for the requirement that a defendant testifying in his own behalf present himself for examination before other defense witnesses testify. It should be noted that Tennessee Code Annotated § 24-106 was enacted sixteen years prior to § 40-2403, which regulates the order of the defendant's testimony. Requiring the defendant to testify first, if he testifies at all, ensures that he will not be tempted to alter his own testimony after hearing other evidence presented in his behalf. The requirement places a substantial burden on the defendant, however, in that it forces him to exercise his option to testify before he has the opportunity to observe the strength of his defense. It is contended in the instant case that this places such burden on the defendant as to deprive him of due process of law. Further it is contended that this requirement abridges a defendant's right to remain silent, and also violates Tennessee Constitution, Article 1, Section 9.

It appears that only one other statute similar to §40-2403 exists. A Kentucky statute provides as follows:

> (1) In any criminal or penal prosecution the defendant, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or create any presumption against him.
>
> (2) A defendant so requesting to be allowed to testify for himself shall not be allowed to testify in chief after any other witness has testified for the defense. Ky. Rev. Stat Ann. §421-225 (1962).

There appear to be no reported Kentucky cases which have dealt with this section.

Several cases from other jurisdictions deal with the problem of whether a defendant should be required to take the witness stand as the first defense witness. None of these cases deal

with a statute similar to the Tennessee and Kentucky statutes; none is based upon constitutional considerations.

United States v. Shipp, 359 F.2d 185 (6th Cir. 1966), held that no prejudicial error was committed when the district court rules that if the defendant was going to testify he must do so before he presented any other proof in his own behalf, and that he must do so before any other witnesses testified or offered proof. In reaching this decision, the Court quoted from *United States v. Copeland*, 295 F.2d 635 (4th Cir. 1961), cert. denied 368 U.S. 955 (1962). The quoted portion of the Copeland opinion is as follows:

> There can be no question but that the order of the reception of evidence lies within the discretion of the Trial Judge, whose action will not be reversed on appeal unless it amounts to a gross abuse of discretion. 295 F.2d at 636.

In Copeland, the defendant had been convicted of violating Internal Revenue Laws relating to distilled spirits, and he appealed. One of the defendant's contentions was that a statement offered to prove a conspiracy was introduced as evidence prior to the introduction of independent evidence of the conspiracy.

United States v. Shipp, supra., was not decided by a unanimous court. Senior Circuit Judge McAllister entered a strong dissent to the holding. The reasoning used by Judge McAllister deserves the lengthy quote which follows:

> "The defense of a man charged with crime is often one of the most difficult professional tasks which confronts a lawyer. The witnesses to be called to sustain the defense are frequently persons whose character can be easily assailed by the prosecution. . . . If the man charged with crime takes the witness stand in his own behalf, any and every arrest and conviction, even for lesser felonies, can be brought before the jury by the prosecutor, and such evidence may have devestating and deadly effect although unrelated to the offense charged. The decision as to whether the defendant in a criminal case shall take the stand is,

> therefore, often of utmost importance and counsel must, in many cases, meticulously balance the advantages and disadvantages of the prisoner's becoming a witness in his own behalf. Why, then, should a court insist that the accused must testify before any other evidence is introduced in his behalf, or be completely foreclosed from testifying thereafter? We have come a long way in protecting the rights of accused persons in courts, and their rights cannot be made to depend upon a bargain between the accused and the court that if the accused will testify first, then his other witnesses can testify; otherwise, not."

Two jurisdictions, Mississippi and Washington, D.C. have whole-heartedly followed the reasoning of Judge McAllister's dissent in *United States v. Shipp, supra.*

The time-honored case of *Bell v. State,* 66 Miss. 192 5. So. 389 (1889) appears to be the first case to determine whether a defendant must be the first defense witness. In Bell, the defendant had been convicted of assault with intent to kill. At his trial, he was told that if he desired to testify he must do so before other witnesses for the defense were examined. The Supreme Court of Mississippi in a well-reasoned opinion held such a requirement to be reversable error. The court's reasoning was as follows:

> It must often be a very serious question with the accused and his counsel whether he shall be placed on the stand as a witness and subjected to the hazard of cross-examination, and one which cannot be a question that he is not required to decide upon a full survey of all the case, as developed by the state and met by witnesses on his own behalf. He may intelligently weigh the advantages and disadvantages of his situation; and, thus advised, determine how to act, whether he shall testify or not; if so, at what stage in the progress of his defense, are equally submitted to the free and unrestricted choice of one accused of crime, and are in the very nature of things beyond the control or discretion of the presiding trial judge. Control as to either is coercion and coercion

> is denial of freedom of action. 66 Miss. at 194, 5 So. at 389.

Roberson v. State, ___Miss.___185 So. 2d 667 (1966) dealt with the question decided in Bell. Although the decision in Roberson was upon other grounds, the principles in Bell, quoted above, were reaffirmed.

In *Nassif v. District of Columbia*, 201 A.2d 519 (D.C. 1964) the court adopted the view expounded by *Bell v. State*, *supra*. The defendant had been convicted of indecent exposure. The trial court required the defendant to elect whether he would testify as the first defense witness or not at all. Defendant chose not to testify. In ordering a new trial, the court quoted from the Bell case, and also discussed *Clemons v. State*, 92 Tenn. 282, 21 S.W. 525 (1893). The Court distinguished Clemons on the ground that a statute required the result reached.

As pointed out above, none of the cases deciding the question presented by the instant case were based upon constitutional considerations. All concerned abuse of discretion on the part of an inferior court. It is contended, however, that to require the defendant to elect to testify first, or not at all, is not only unwise but also a deprivation of due process of law, an infringement of the right to remain silent, and a violation of Tennessee Constitution, Article 1, Section 9, and Sixth Amendment.

A defendant in a criminal prosecution has a constitutional right to testify in his own behalf. This right is guaranteed by the Tennessee Constitution. Tennessee Constitution, Article 1, Section 9, provides in part:

> That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel. . . .

This provision significantly predates the requirement of Tennessee Code Annotated § 40-2403 that the accused present himself as the first defense witness, if he chooses to testify at all. It is submitted that § 40-2403 encroaches upon the constitutional right extended to the accused, and therefore, must fall.

Charles Wilson v. The State, 50 Tenn. 232 (1871) interpreted Tennessee Constitution, Article 1, Section 9. The Court said:

> We are of the opinion that the prisoner in all criminal prosecutions, after the testimony has been heard for and against him, has a right to be heard in an argument in his own behalf and as his own advocate, or in an explanation of the circumstances which have been testified against him. That it is error to deny him this right.
>
> In other words, the Constitution guarantees to every prisoner the right to explain the case made against him, in his own way.

When Article 1, Section 9 as construed by *Charles Wilson v. The State, supra,* is viewed in the light of the requirements of the Constitution of the United States, it becomes clear that Tennessee Code Annotated, § 40-2403 cannot be allowed to stand as law. In *Ferguson v. Gerogia,* 365 U.S. 570 (1961), the Court declared unconstitutional a Gerogia statute which provided that although the defendant be incompetent to testify, he could make an unsworn statement. When the accused started to commence his statement, his counsel desired to direct the giving of the statement. The United States Supreme Court found that the Georgia court's refusal to allow defendant's unsworn statement to be directed by counsel was a denial of effective assistance of counsel at a crucial point in his trial, and thus violated the due process clause of the Fourteenth Amendment.

The portion of Tennessee Code Annotated § 40-2403 objected to in the instant case, after providing that a defendant may testify in his own behalf, states:

> But the defendant desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case.

Certainly, Tennessee Constitution, Article 1, Section 9, construed in light of the requirements of *Ferguson v. Georgia* as it must be affords the defendant the right to make a state-

ment after all evidence is in, and this statement may be directed by counsel. It is submitted that the giving of a statement controlled by counsel is "testimony", despite the fact that the defendant in making the statements "is not to be sworn or cross-examined as a witness". *Charles Wilson v. The State*, 50 Tenn. 232, 242 (1871). Although the *Charles Wilson* case declares such a statement to be "not testimony, in its legal sense, it is submitted that logic dictates otherwise. Thus, the requirement imposed by S40-2403, that the defendant choose between testifying first and not testifying at all, is in violation of the Tennessee Constitution, Article 1, Section 9, which guarantees the defend- the right to be heard at some time later.

Further, it is submitted that the interpretation placed upon Tennessee Constitution, Article 1, Section 9 by *Charles Wilson v. The State*, supra is no longer good law. It is clear that at the time Charles Wilson was decided, the defendant did not have the right to testify as a sworn witness in his own behalf. The Court pointed out that the Constitution provisions embodied in Article 1, Section 9, "certainly do not mean that he, the defendant may become a sworn witness in his own behalf". 50 Tenn. at 238. Sixteen years after *Charles Wilson*, in Code S40-2402, the Tennessee General Assembly provided:

> In the trial of all indictments, presentments and other criminal proceedings, the party defendant thereto may, at his request, but not otherwise be a competent witness to testify therein.

Thus, the legislature effectively overturned the *Charles Wilson* interpretation of the language of Article 1, Section 9, for that case was predicated upon the idea that the defendant was incompetent to be sworn as a witness.

What then, does the language of Article 1, Section 9, mean? It is submitted that the interpretation placed upon the language by Judge Freeman, concurring in *Charles Wilson*, must control. Judge Freeman stated Article 1, Section 9 to mean:

> That he, the defendant, shall have the privilege of being defended in an argument before the jury, by counsel, in addition to the common law privilege of defending himself. 50 Tenn. at 247.

Thus, Judge Freeman felt that the constitutional right referred to the time that evidence is being put in, not to when it is all in. Freeman also stated:

> . . . that a prisoner may be heard in his own defense and may be heard by counsel, means simply that such counsel shall make such argument in his defense, against the prosecution, as may be warranted by law and the facts of the case; and that, being heard by himself, means precisely the same thing . . . (*Emphasis* added) 50 Tenn. at 246.

It seems clear that the import of Article 1, Section 9 was to afford the defendant the right to be heard in his own behalf during the proceedings. Code §40-2402 merely clarified this right. It is submitted that Article 1, Section 9, cannot be abridged by unreasonable restrictions, and that the requirement that the defendant present himsel as the first witness in his own behalf is unreasonable. See *Bell v. State* and *Nassif v. District of Columbia,* discussed above. The defendant in the instant case respectfully prays that this Court declare that the portion of Code §40-2403 requiring the defendant to testify first be declared unconstitutional as a violation of the Tennessee Constitution, Article 1, Section 9 and the Sixth Amendment of the Federal Constitution.

Code §40-2402 expressly removes an accused's incompetency to testify. Further, it is submitted that under Article 1, Section 9, the defendant must be allowed o testify in his own behalf. Code §40-2403 provides that no presumption against the defendant arises as a consequence of his failure to testify, this section also provides that the defendant desiring to testify shall do so before any other testimony for the defense is heard. The latter portion of Code §40-2403, requiring the defendant to testify first, if at all,

abridges a defendant's right to remain silent under the Fifth Amendment of the United States Constitution.

Certainly Code § 40-2403 does not deny a defendant the right to be heard, nor does it deny a defendant the bare right to remain silent. The requirement that the defendant exercise his right to remain silent at a time when he does not yet know of the effectiveness and scope of his defense, however, serves to "chill" the exercise of this right. Before the defendant, in a criminal proceeding, has seen his defense unfold before the trial court and jury, he cannot make an intelligent waiver of his right to remain silent. Measures which serve to "chill" or penalize the exercise of constitutional rights cannot stand as law. *Griffin v. California*, 380 U.S. 609 (1965), *United States v. Jackson*, 390 U.S. 570 (1968).

In *Griffin v. California*, 380 U.S. 609 (1965) the United States Supreme Court held that the trial court's and the prosecutor's comments on the defendant's failure to testify violated the self-incrimination clause of the Fifth Amendment. The basis of this decision is that to comment upon the exercise of the constitutional right to remain silent imposes a penalty upon the exercise of that right. The Court stated:

> It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privileges by making its assertion costly. 380 U.S. at 614.

Although Tennessee does not allow comment upon the exercise of the right to remain silent, by forcing the defendant to elect whether to exercise or waive the privilege at a time when the desirability for waiving it is unknown, Code § 40-2403 likewise "cuts down on the privilege."

In *United States v. Robel*, 389 U.S. 258 (1967), the States Supreme Court held that a law making it illegal for a person who is a member of a Communist-action organization to accept employment in any defense facility is unconstitutional. The court pointed out that this

violated an individual's right of association, protected by the First Amendment. Thus, in *Robel.*, the court struck down a law which placed a penalty on a person's exercise of constitutional rights. *Shelton v. Tucker*, 364 U.S. 479 (1960) is in agreement. In *Shelton*, the Court stated:

> In a series of decisions this Court has held that even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. 364 U.S. at 488.

In the instant case, it is admitted that the purpose of Code § 40-2403 cannot be more narrowly achieved. The purpose of this Code provision is to ensure that a defendant not be tempted to color his version of the circumstances by hearing witnesses in his favor prior to his own testimony. Perhaps this purpose is legitimate. The choice to be made by the defendant in electing to waive his constitutional right to remain silent, however, is of such paramount importance that a requirement such as found in Code § 40-2403 serves to "chill" the exercise of that right.

In *United States v. Jackson*, 390 U.S. 570 (1968) the Court held that the Federal kidnaping Act:

> . . . . tends to discourage defendants from insisting upon their innocence and demanding trial by jury . . . . 390 U.S. at 583.

The Court also stated:

> We agree with the District Court that the death penalty provision of the Federal Kidnapping Act imposes an impermissible burden upon the exercise of a constitutional right . . . . 390 U.S. at 572.

The language used by the Court in Jackson is significant. The Court made it clear that it would tolerate no requirements which penalize or "chill" the exercise of constitutional rights.

The Court said:

> Whatever may be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. The question is not whether the chilling effect is "incidental" rather than intentional: the question is whether that effect is unnecessary and therefore excessive. 390 U.S. at 582.

The late Justice Hugo Black in a dissenting opinion in *Williams v. Florida*, 90 S.Ct. 1893 spoke of the Fifth Amendment privilege:

> It is no answer to this argument to suggest that the Fifth Amendment as so interpreted would give the defendant an unfair element of surprise, turning a trial into a "poker game" or sporting contest", for that tactical advantage to the defendant is inherent in the type of trial required by our Bill of Rights. The Framers were well aware of the awesome investigative and prosecutorial powers of government and it was in order to limit those powers that they spelled out in detail in the Constitution the procedure to be followed in criminal trials. Defendants, they said, are entitled to notice of the charges against them, trial by jury, the right to counsel for their defense, the right to confront and cross-examine witnesses, the right to call witnesses in their own behalf, and the right not to be a witness against themselves. All of these rights are designed to shield the defendant against state power. None are designed to make convictions easier and taken together they clearly indicate that in our system the entire burden of proving criminal activity rests on the State. The defendant, under our Constitution, need not do anything at all to defend himself, and certainly he cannot be required to help convict himself. Rather he has an absolute, unqualified right to compel the State to investigate its own case, find its own witnesses, prove its own facts and convince the jury through its own resources. Throughout the process the defendant has a fundamental

> right to remain silent, in effect challenging the State at every point to "Prove it".
>
> A criminal trial is in part a search for truth. But it is also a system designed to protect "freedom" by insuring that no one is criminally punished unless the State has first succeeded in the admittedly difficult task of convincing a jury that the defendant is guilty. That task is made more difficult by the Bill of Rights, and the Fifth Amendment may be one of the most difficult of the barriers to surmount. The Framers decided that the benefits to be derived from the kind of trial required by the Bill of Rights were well worth any loss in "efficiency" that resulted. Their decision constitutes the final word on the subject, absent some constitutional amendment. That decision should not be set aside as the Court does today.

The reasoning employed in *Bell v. State, supra, Nassif v. District of Columbia, supra,* and the dissent in *United States v. Shipp, supra,* are persuasive. Briefly, the main points of those opinions are: (1) that the defendant will be subjected to the hazards of cross-examination, including attacks upon his character, if he chooses to testify; (2) the defendant may not intelligently weigh the advantages and disadvantages of testifying until he first knows whether testifying would help his cause; and (3) the choice of whether to testify is a choice which must be left to the unfettered freedom of the defendant.

For the above reasons, Code § 40-2403 "chills" the defendant's exercise of his right to remain silent. Since Code § 40-2403 is at variance with the Fifth Amendment of the United States Constitution, it should be declared null and void. The defendant in the instant case prays that the court will declare § 40-2403 to be null and void.

II. CODE SECTION 40-2403 DEPRIVES A DEFENDANT OF DUE PROCESS OF LAW, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Tennessee Code Annotated, Section 40-2403 is unconstitutional in that it deprives a person of due process of law, guaranteed by the Fourteenth Amendment provides, in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty or property without due process of law*. . . .(Emphasis added)

It is submitted that Code § 40-2403, in requiring the defendant to testify as the first witness in his own behalf, if he chooses to testify, denies the defendant effective assistance of counsel, thus depriving the defendant of due process of law.

In *Ferguson v. Gerogia*, 365 U.S. 570 (1961), the Court declared that refusal to allow the defendant's counsel to ask the defendant questions while the defendant made an unsworn statement was a violation of due process of law. The basis of the Court's decision is that the Georgia practice denied the defendant of effective assistance of counsel.

In *Ferguson v. Georgia*, 365 U.S. 570 (1961) the Court declared that refusal to allow the defendant's counsel to ask the defendant questions while the defendant made an unsworn statement was a violation of due process of law. The basis of the Court's decision is that the Georgia practice denied the defendant of effective assistance of counsel.

> Perhaps any adverse consequences resulting from these anomalous characteristics might be in some measure overcome if the defendant could be assured of the opportunity to try to exculpate himself by an explanation delivered in an organized, complete

coherent way. *But the Georgia practice puts obstacles in his way.* (Emphasis added) 365 U.S. at 591.

In *Powell v. Alabama*, 287 U.S. 45 (1932) the Court stated that in criminal prosecutions for capital offenses the defendant must be given "the guiding hand of counsel at every step in the proceedings against him." In Powell, the defendants had been altogether denied assistance of counsel. In Ferguson, the defendant did have the assistance of counsel. The presence of counsel did not prevent the Court from finding, however, that the Georgia law denied the defendant effective assistance of counsel. Denial of effective assistance of counsel than the requirement that it be decided whether the defendant testifies as the first defense witness or not at all.

The landmark decision of *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792 held that the Sixth Amendment to the Federal Constitution providing that in all criminal prosecutions the accused shall enjoy the right to assistance of counsel for his defense is made obligatory on the States by the Fourteenth Amendment, and an indigent defendant in criminal prosecution in state court has right to have counsel appointed for him.

It is a serious matter of decision as to whether a defendant in a criminal proceeding shall waive his constitutional right to remain silent, and take the stand in his own behalf. This decision requires that the attorney delicately weigh the pros and cons of placing the defendant on the witness stand. To require that the decision be made before the defendant and his counsel can determine the propriety of having the defendant take the stand certainly presents undue obstacles and shakles the "guiding hand of counsel." Thus, under the view of *Ferguson v. Georgia, supra*, Code § 40-2403 violates the Due Process Clause of the Fourteenth Amendment. The defendant in the instant case respectfully prays that this Court so hold.

SUMMARY OF ARGUMENT

The decision below in preventing petitioner from testifying after other witnesses had testified for the defense under the provisions of Tennessee Code Annotated § 40-2403 violated petitioner's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 9 of the Tennessee Constitution.

It is the contention of the petitioner that the statute in question prevents him from testifying in his own behalf after he has made the initial decision not to testify even though his defense proof doesn't develop the way that he anticipated at the time he chose not to testify at the close of the State's proof. Under the Tennessee Statute petitioner is precluded from testifying once another witness has testified for the defense. Therefore, petitioner and his counsel is placed in the position of having to make a decision at the close of the State's proof which cannot be altered if he chooses not to testify no matter how the defense proof stands up under the cross-examination of the State. As stated by Justice Black in *Williams v. Florida, supra:*

> Any lawyer who has actually tried a case knows that, regardless of the amount of pretrial preparation, a case looks far different when it is actually being tried than when it is only being thought about.

Petitioner would show that only Tennessee and Kentucky have such a statute and that in the Federal Court system a defendant is allowed to testify when he chooses.

The statute in question prevents a defendant from testifying in his behalf if he chooses not to be the first witness for the defense. Such a prohibition in effect requires him to waive his right to remain silent and exercise his right to testify in his own behalf at one particular time in the proceeding after which he has no other choice. This statute is a flagrant violation of the Due Process clause of the Fourteenth Amendment.

ARGUMENT

The trial court was in error in refusing to allow defendant to be placed on the witness stand after other witnesses had testified in his behalf as said Tennessee Statute requiring defendant to be first witness is unconstitutional in violation of the Fifth, Sixth and Fourteenth Amendments of the Federal Constitution and Article I, Section 9 of the Tennessee Constitution.

Code Section 40-2403 deprives a defendant of due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Court below should be reversed and the cause remanded to the State of Tennessee for a new trial and Tennessee Code Annotated Section 40-2403 be declared unconstitutional.

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CERTIFICATE

I hereby certify that a copy of the foregoing Brief of Petitioner to the United States Supreme Court has been served by U.S. Mail, postage prepaid this 30th day of December, 1971 upon David Pack, Attorney for Respondent.

Jerry H. Summers